STATE OF MICHIGAN

COURT OF APPEALS

GLORIA DENNING and DWIGHT DENNING,

Plaintiffs-Appellees,

v

LAWRENCE WALIGORSKI d/b/a L&L MOBIL WEST,

Defendant-Appellant.

UNPUBLISHED
January 9, 1998

No. 183242
Ingham Circuit Court
LC No. 89-063946-NO

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the judgment in favor of plaintiffs, entered pursuant to a jury verdict, in this premises liability case. We reverse and remand.

Plaintiff Gloria Denning injured her leg when she was at defendant's gasoline station. Denning fell while running away from a German shepherd that was on the premises and which growled and lunged at her. Plaintiffs subsequently brought this action against defendant. After the first trial, the jury found for defendant. The trial court granted plaintiffs' motion for a new trial, finding that the verdict was against the great weight of the evidence. After the second trial, the jury found for plaintiffs.

Defendant first argues that the trial court erred in granting plaintiffs' motion for a new trial on the ground that the first jury's verdict was against the great weight of the evidence. We agree. We review the trial court's decision for an abuse of discretion. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). The trial court's function in ruling on plaintiffs' motion was to determine whether the overwhelming weight of the evidence favored plaintiffs. *Scott v Illinois Tool Works*, 217 Mich App 35, 40-41; 550 NW2d 809 (1996).

Whether a defendant exercised reasonable care under the circumstances is a question for the jury. *Terrell v LBJ Electronics*, 188 Mich App 717, 722; 470 NW2d 98 (1991). In finding the first jury's verdict against the great weight of the evidence, the trial court stated:

> After carefully reviewing the testimony offered, the [c]ourt concludes that a new trial must be granted. The jury's verdict was against the great weight of the evidence. Most of the facts are undisputed. Plaintiff came to the premises to undertake legitimate business, proceeded to fill her car with gasoline, walked to the building and was confronted by the unattended and unleashed [G]erman shepherd. At that time, [d]efendant's employees, Scott Harkness and Tim Kantner, were both present.
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> Harkness was familiar with both the dog and its owner, a 12-year old neighbor boy, Steven Cooper. Harkness knew that the boy had brought the [G]erman shepherd to the premises on prior occasions and was aware that this dog had barked at and disturbed customers in the past. Thus, Scott Harkness was aware of the dog and its proclivities to disturb customers. Moreover, [d]efendant has admitted that he had a policy prohibiting the presence of dogs on the premises, and Mr. Harkness was aware of that policy. He obviously recognized the problem presented by the dog since he had previously told Steven Cooper not to bring the dog to the premises. On this occasion, he instructed Cooper to take his dog home, apparently relying on the young man to remove the dog from the premises. Thereafter, Mr. Harkness did not see the dog but did observe the boy inside the station purchasing an item of some kind. At the time, Harkness was attending to a self-serve customer and did nothing more to ascertain that his directions had been followed. Specifically, Harkness did not take any steps to inspect the premise or exit the building to assure that [Steven] Cooper took the dog home as he had been directed. As it turned out, the dog had not been removed from the premises, a fact which would have been easily observable by [d]efendant's employees had they taken minimal steps to do so.
>
> Given the [d]efendant's own policy, given the nature of the dog, given the fact that the dog was both untethered and unattended, given [d]efendant's employees' knowledge of the dog's presence and their failure to take effective steps to remove the dog from the premises, given their reliance on a 12-year old boy to carry out their own duties, given their recognition of the danger which this dog might represent and given their awareness of the dog's proclivities, the [c]ourt is satisfied and finds that the verdict of the jury is against the great weight of the evidence. A new trial must be granted in accordance with MCR 2.611(A)(1)(e).

In rendering its verdict, the jury necessarily was required to determine whether defendant took reasonable steps to ensure that the dog had been removed from the premises. Although expressed as a determination that the verdict was against the great weight of the evidence, the trial court's comments indicate that it granted a new trial merely because it disagreed with the jury's implicit finding on that issue.

We recognize that, in assessing the evidence under a great weight standard, the trial court may weigh credibility as a so-called "thirteenth juror." See *People v Bart (On Remand)*, 220 Mich App 1, 13; 558 NW2d 449 (1996). However, "the hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law. It is to be approached by the court with great trepidation

and reserve, with all presumptions running against its invocation." *Id*. As our Supreme Court in *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), cautioned, "this exercise of judicial power is to be undertaken with great caution, mindful of the special role accorded jurors under our constitutional system of justice." The *Herbert* Court also noted the long-established principle that a trial judge may only grant a new trial where the jury's verdict is "perverse." See *id*. at 476. In this case, the trial court's stated reasons for granting a new trial did not meet this high standard. Thus, we conclude that the court exceeded its discretion by invading the province of the jury. See *Bridwell v Segel*, 362 Mich 102; 106 NW2d 386 (1960).

We reverse the trial court's order and remand the case for entry of a judgment pursuant to the first jury's verdict of no cause of action. In light of our disposition of this issue, we need not address the remainder of defendant's appellate arguments.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski